Supreme Court, U.S.
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No. 92-1015

In The

Supreme Court of the United States

October Term, 1992

CHESTER SANSON,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), preempts petitioner's state law fraud claim to recover benefits under a special retirement plan covered by ERISA.

2. Whether the Court should judicially amend ERISA by creating a form of relief Congress did not provide in ERISA's comprehensive statutory enforcement scheme.

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are set forth in the caption of this case.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

This Court has jurisdiction of the petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of ERISA involved in this case are set forth accurately in the Petition at 2.

STATEMENT OF THE CASE[1]

Petitioner worked at General Motors' Lakewood assembly plant for over thirty years, voluntarily retiring under the standard provisions of General Motors' early retirement program for salaried employees.[2] Petitioner contends that he requested standard early retirement solely as a result of alleged misrepresentations by his supervisor, R. L. Maraffi, that General Motors did not plan to offer enhanced retirement benefits to Lakewood employees and no special exception could be made for him. Petitioner alleges that, but for Maraffi's statements, he would have continued his employment with General Motors at least until it became clearer whether the special incentive retirement plan would become available, and additionally contends that he met the eligibility requirements of the special retirement plan that ultimately became available. (App. 2a; R1-1).[3]

Several months after his retirement, petitioner learned that a special retirement program had been made available to certain eligible employees at the Lakewood plant after his retirement. Petitioner immediately sent a letter to Lakewood management demanding that his retirement benefits be increased to the level

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1. Petitioner's Statement sets forth as fact much that is disputed between the parties, as well as his legal position in this case. For these reasons, General Motors cannot accept petitioner's "facts" and herein sets forth its own Statement of the Case.

2. Petitioner's Statement is calculated to give the impression that he has been "hoodwinked" out of his retirement benefits. That is not the case. As petitioner concedes, he is receiving the retirement benefits to which he is entitled under the standard early retirement plan under which he retired. What he seeks are the enhanced benefits made available to employees who retired after he did.

3. All cites are to the Appendices in the Petition or to the record in the Eleventh Circuit Court of Appeals.

provided by the special retirement plan. In that letter, petitioner did not mention any alleged misrepresentations by Maraffi or anyone else. (App. 2a; R2-54).

General Motors denied petitioner's request. It explained that petitioner was not eligible for special early retirement benefits because not only had petitioner retired prior to the time the program became available at Lakewood, but also his job had not been eliminated in the reduction in force which led to the program's becoming available at Lakewood. General Motors also noted that the decision to have a reduction in force at Lakewood was made after petitioner retired. (App. 2a; R2-54).

Petitioner disputes General Motors' reasons for denying him enhanced benefits. He claims that he would not have retired if Maraffi had not misled him in two respects:

> 1) by allegedly assuring petitioner that Maraffi would request that Lakewood plant management make an exception by providing special early retirement benefits to him alone and yet failed to make that request; and
>
> 2) by advising him that the special early retirement program would not be made available at the Lakewood plant, allegedly knowing at the time that it would be. Based on these alleged misrepresentations, petitioner sued for fraud and seeks to recover, *inter alia,* the enhanced incentive retirement benefits, as well as compensatory and punitive damages. (App. 2a; R1-1).

After the close of discovery in the district court, General Motors moved for summary judgment on the ground that, *inter alia,* petitioner's state law fraud claims related to a qualified employee benefit plan and were, therefore, preempted by ERISA. The district court denied General Motors' Motion for Summary

Judgment; its motion for leave to file a Motion for Reconsideration; and its motion for immediate interlocutory appeal. (App. 2a, 24a-26a).

Thereafter, this Court held in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S. Ct. 478 (1990), that ERISA preempted a former employee's state law claim of wrongful discharge against his employer. The district court then agreed to reconsider General Motors' Motion for Summary Judgment and granted it based on a "faithful application" of *McClendon.* The district court also denied petitioner leave to amend his complaint to assert an ERISA claim because it would be "futile." (App. 2a, 24a-26a).

On appeal, a panel of the Eleventh Circuit Court of Appeals affirmed the district court, with one dissent. Petitioner filed a timely Petition for Certiorari with this Court. (App. la-16a). This response is being filed at the Court's request.

REASONS FOR DENYING THE WRIT

This is not a proper case in which to grant a writ of certiorari because the Eleventh Circuit correctly interpreted and applied *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S. Ct. 478 (1990), to hold that petitioner's claim for enhanced retirement benefits "relates to" General Motors' special retirement plan and is, therefore, preempted by ERISA. Although petitioner purported to bring this action as a common law fraud claim, his claim is premised upon the existence of the special retirement plan and seeks the benefits which that plan provides.

The Eleventh Circuit also properly denied petitioner leave to amend his complaint because petitioner cannot state a claim under ERISA; therefore, an amendment would be futile. Petitioner does not seriously dispute this aspect of the decision below, inasmuch as

he acknowledges that he is not a participant or beneficiary under the literal language of ERISA. Petitioner nonetheless asks this Court to judicially amend ERISA to provide a form of relief not provided by Congress to a class of persons for whom Congress provided no relief. Only Congress should provide that relief.

I.

ERISA PREEMPTS PETITIONER'S STATE LAW FRAUD CLAIM BECAUSE HE IS SEEKING TO RECOVER BENEFITS UNDER A SPECIAL RETIREMENT PLAN COVERED BY ERISA.

Petitioner's arguments against preemption (as well as Judge Birch's dissent in the Eleventh Circuit) boil down to a refusal to accept that this Court meant what it said in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990). In *McClendon*, the Texas Supreme Court held that an employee could recover pension benefits in an action against his employer for wrongful discharge even though the employee was claiming that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund. 498 U.S. at __, 111 S. Ct. at 481. This Court reversed, holding that ERISA preempted the state common law claim. This Court relied on Section 514(a) of ERISA, which preempts:

> [A]ny and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis added).

In finding McClendon's claim preempted, this Court reasoned

that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *McClendon,* 498 U.S. at __, 111 S. Ct. at 483 (quoting *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 96-97 (1983)). Under this "broad, common-sense meaning" a state law may "relate to" a benefit plan, and thereby be preempted, even if the law was not specifically designed to affect such plans or only indirectly affects such plans. *McClendon,* 498 U.S. at __, 111 S. Ct. at 483 (quoting *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987)); *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 525 (1981).

McClendon, consistent with this Court's long-standing expansive interpretation of the ERISA preemption clause, noted that the clause is "conspicuous for its breadth." 498 U.S. at __, 111 S. Ct. at 482; *see also FMC Corp. v. Holliday,* 498 U.S. 52, __, 111 S. Ct. 403, 407 (1990). Its "deliberately expansive language" was "designed to establish pension plan regulation as exclusively a federal concern." *McClendon,* 498 U.S. at __, 111 S. Ct. at 482 (quoting *Pilot Life,* 481 U.S. at 46).

Thus, although recognizing that ERISA preemption was not unlimited, this Court had "no difficulty" concluding that ERISA preemption applied to the employee's wrongful termination claim. *McClendon,* 498 U.S. at __, 111 S. Ct. at 482-83. The employee's cause of action specifically referred to, and relied upon, the existence of a plan. To prevail, the employee had to plead, and the court had to find, that an ERISA plan existed and that the employer had a pension-defeating motive in terminating employment. This Court concluded that the Texas cause of action "related to" an ERISA plan. 498 U.S. at __, 111 S. Ct. at 483.

This Court thus rejected the employee's argument that the pension plan was irrelevant and that the sole issue in a wrongful discharge action was the employer's improper termination motive:

> The argument misses the point, which is that under the Texas court's analysis there is simply *no* cause of action if there is no plan.

498 U.S. at __, 111 S. Ct. at 484 (emphasis in original).

This Court further concluded that preemption of the state law claim for wrongful termination was consistent with the goal of ERISA preemption:

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. . . . It is foreseeable that state courts exercising their common law powers, [*sic*] might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

498 U.S. at __, 111 S. Ct. at 484 (citations omitted).

The reasoning of *McClendon* applies squarely to the claims which petitioner asserts in this lawsuit. In the absence of General Motors' special retirement plan, petitioner would have no reason to claim misrepresentation. Moreover, petitioner's claim is a claim for benefits under an ERISA-covered plan: he seeks to recover the enhanced retirement benefits he alleges he would have received

under the special early retirement plan but for General Motors' alleged misrepresentations. Accordingly, petitioner's claim of misrepresentation "relates to" General Motors' employee benefit plan and is preempted by ERISA. *See, e.g, Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1421 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 2968 (1992); *Barr v. American Cyanamid Co.*, 808 F. Supp. 752, __, 16 E.B.C. 1196, 1202-03 (W.D. Wash. 1992).

Stated another way, to prevail on his claim of fraudulent misrepresentation, petitioner must prove that General Motors intentionally misrepresented a material fact to him, knowing he would rely on it; he relied on it; and he was damaged as a direct result of the alleged misrepresentation. *See, e.g., Eckerd's Columbia, Inc. v. Moore*, 155 Ga. App. 4, 270 S.E. 2d 249 (1980). The material facts at issue in this case are whether General Motors misrepresented petitioner's eligibility for the special retirement program — an employee benefit plan indisputably subject to ERISA — and whether General Motors knew the plan would be available at Lakewood when it told petitioner it would not. Section 514(a) is directly applicable to these claims because both the material facts petitioner claims General Motors misrepresented *and* the damages sought relate directly to the special retirement plan. Thus, the special retirement plan is not incidental to petitioner's cause of action; it is central to it.

The Court recently expanded *McClendon*'s broad reading of ERISA's preemptive scope, holding that a state law relates to a covered benefit plan for preemption analysis if it refers to or has a connection with such a plan, "'even if the law is *not desiqned to affect the plan or the effect is only indirect,'* . . . *and even if the law is 'consistent with ERISA's substantive requirements.'*" *District of Columbia v. Greater Washington Bd. of Trade*, __U.S.__, 113 S.Ct. 580, __ (1992) (emphasis added) (citing *McClendon and Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739

(1985)). In *Washington Bd. of Trade* this Court first observed that workers' compensation plans are themselves exempt from ERISA regulation. *See* 29 U.S.C. § 1003(b)(3). Despite this exemption of workers' compensation plans from ERISA's reach, this Court held that ERISA preempted a District of Columbia law that required employers who provide health care benefits to their employees to provide equivalent coverage to employees eligible for workers' compensation benefits, to the extent that the law applied to employers whose plans were covered by ERISA. The law was not preempted to the extent it applied to employers whose plans were exempt from ERISA, such as "governmental" or "church" plans under Sections 4(b)(1) and (2). *See* 29 U.S.C. § § 1003(b)(1) and (2).

Thus, even the express exemptions from ERISA coverage do not limit the broad preemptive sweep of ERISA with regard to state laws that affect covered plans. If a plan is covered by ERISA, any state regulation of that plan is preempted, including indirect regulation by direct regulation of an exempt plan. Because the state fraud law at issue here would indirectly regulate an ERISA-covered plan through its direct regulation of the benefit relationship between General Motors (the provider of the ERISA-covered plan) and petitioner (who seeks additional benefits under the plan), the State law is preempted under *Washington Bd. of Trade*.

Petitioner asks this Court to narrow its focus solely to the fact that a misrepresentation occurred; he contends that the content of the alleged misrepresentation is irrelevant. This argument misses the point, just as the employee's argument in *McClendon* missed the point.[4] The content of the misrepresentation relates to

4. In his Eleventh Circuit dissent, Judge Birch analogizes petitioner's claim to that of a woman, the manager of a pension plan, who alleges that her employer has sexually harassed her. He argues that because the female employee might have to prove the existence of the pension plan under state law, her claim would (Cont'd)

petitioner's desire to obtain benefits available only under General Motors' special retirement plan. This represents a bald attempt to circumvent plan requirements in order to obtain additional benefits for which petitioner was not eligible.[5]

As in *McClendon*, preemption of petitioner's claim is consistent with the goal of ERISA preemption. It is foreseeable that state courts exercising their common law powers over claims of alleged misrepresentations could develop different substantive

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(Cont'd)
be lost under the majority's decision. This argument fundamentally mischaracterizes the scope of ERISA preemption defined both in this Court's precedents and in the decision below. Whether the female manager's claim be predicated on Title VII of the Civil Rights Act of 1964 (which is expressly *not* preempted by ERISA; *see* 29 U.S.C. § 1144(d)) or on Georgia tort law, the existence of the pension plan in her case is irrelevant; her claim is premised upon being subjected to conduct, of a sexual nature, which was offensive and unwelcome, and which altered the conditions of her employment. *See, e.g., Coleman v. Housing Auth.*, 191 Ga. App. 166, 167, 381 S.E.2d 303, 305 (1989) (setting forth examples of conduct that constitutes actionable sexual harassment under Georgia common law). Her claim is not preempted because no *material fact* of her claim is premised on the existence of the pension plan and she is not seeking recovery of benefits from the plan that would have been available but for the harassment. *Cf. General American Life Ins. Co. v. Castonguay*, __ F.2d__ , 1993 U.S. App. LEXIS 1412 (9th Cir. 1993) ("ERISA doesn't purport to regulate those relationships where a plan operates just like any other commercial entity - for instance, the relationship between the plan and its own employees. . . . State law is allowed to govern these relationships, [sic] because it's much less likely to disrupt the ERISA scheme.").

5. Petitioner's reliance on Judge Birch's observation that it should not matter for preemption analysis whether General Motors lied about theavailability of an Oldsmobile automobile or a special retirement plan benefit is equally misplaced. If the Oldsmobile were a benefit provided under an ERISA-covered plan, a claim premised upon an alleged misrepresentation relating to the availability of the Oldsmobile would likewise be preempted.

standards in cases involving employee retirement plans, and other ERISA plans as well. For example, some states might provide that the misrepresentation must relate to the amount of benefits, others that the misrepresentation must involve eligibility, and others that punitive and emotional distress damages are available, despite the limited remedies available under ERISA where benefits have been denied. *See* 29 U.S.C. § 1132.

Congress provided specific, limited remedies precisely to avoid the possibility of additional remedies being created which could jeopardize the solvency and desirability of various ERISA plans. Were petitioner's proposed judicial amendments to ERISA allowed, it also might lead employers to reconsider the advisability of providing benefit plans. In *McClendon*, this Court recognized that different states could develop different rules and that to allow this possibility to upset the uniform body of federal benefit law which ERISA created is contrary to the goals of ERISA. 498 U.S. at __, 111 S.Ct. at 484. *See also Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332 (5th Cir.), *cert. denied*, 113 S. Ct. 812 (1992) (ERISA preempts Louisiana statutory wrongful death action against benefit plan utilization review provider where "allowing the [] suit to go forward would contravene Congress's goals of 'ensur[ing] that plans and plan sponsors would be subject to a uniform body of benefit law' and 'minimiz[ing] the administrative and financial burdens of complying with conflicting directives among States or between States and the Federal Government.'")(quoting *McClendon*).

Petitioner contends that the Georgia statute at issue does not relate to General Motors' pension plan because the statute does not refer specifically to a pension plan and because the alleged fraud was perpetrated by General Motors' managers, not by any individual acting in a trust or fiduciary capacity relative to an ERISA-covered plan. The fundamental flaw in this argument is that it ignores that the Texas "law" preempted in *McClendon* —

wrongful discharge in violation of public policy — generally applied in situations that had nothing to do with pension plans, just as Georgia law recognizes fraud actions that have nothing to do with pension plans. Texas law was preempted, however, in the specific situation where the claim presented concerned a violation of public policy premised on the existence of a pension plan. General Motors does not argue that fraud claims that have nothing to do with pension plans or their benefits are preempted. Petitioner's specific claim is preempted because it is premised on, and would not exist but for the existence of, an ERISA-covered pension plan. Likewise, the employer in *McClendon* acted not as a plan fiduciary or administrator in terminating *McClendon*, but as an employer. There is no substantive difference between those facts and petitioner's allegations against General Motors.

Moreover, the fact that the damages petitioner is seeking include the precise amount petitioner would have received *if* he were eligible for the retirement plan demonstrates the relationship between this lawsuit and the special retirement plan. In *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), the Fifth Circuit recognized the relationship between the amount of damages sought and ERISA preemption. In finding that ERISA preempted petitioner's state law fraud claims, the court stated:

> *Petitioner's claim has a definite connection to an employee benefit plan. Petitioner concedes that if he is successful in this suit his damages would consist of the pension benefits he would have received had he been employed by TCI.* To compute these damages, the court must refer to the pension plan under which petitioner was covered when he worked for Goodrich. Thus, the precise damages and benefits which petitioner seeks are created by the Goodrich Employee Benefit Plan.

Id. at 1294 (emphasis supplied); *accord Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1218 (5th Cir.), *cert. denied*, 113 S. Ct. 68 (1992).

Petitioner is also wrong in contending that nothing in ERISA evidences a Congressional intent to extinguish his state law fraud claim even though it is "a significant and universally recognized remedy." (Petition at 11). This Court implicitly rejected this argument in *Pilot Life* when it stated, "the common law causes of action raised in Dedeaux's complaint [which included fraud in the inducement], each based on the alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under § 514(a)." 481 U.S. at 48. Indeed, this Court has repeatedly recognized that Congress expressly limited the scope of ERISA preemption only by the requirement that the state law at issue "relate to" an employee benefit plan. Congress rejected more limited preemption language which would have rendered the clause "applicable only to state laws relating to the specific subjects covered by ERISA." *E.g., McClendon,* 498 U.S. at __, 111 S. Ct. at 482 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 98 (1983)). Moreover, to underscore its intent that section 514(a) be applied expansively, Congress chose equally broad language in defining the "state laws" which are preempted to include "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1).

Moreover, there is no indication in ERISA or its legislative history that fraud actions to recover pension benefits will be exempted from ERISA preemption. When Congress sought to exempt a "law" from ERISA preemption, it did so expressly. *See* 29 U.S.C. § 1144(b) and (d). Moreover, in deciding what actions could be brought under ERISA, Congress, rather than rely on state law, crafted a comprehensive remedial scheme in Section 502 of ERISA itself. 29 U.S.C. § 1132. Section 502 specifically provides

for claims relating only to a failure to pay benefits or for breach of fiduciary duty; it specifically does not provide for a fraud action to recover benefits.

The decision of the Eleventh Circuit holding that ERISA preempts state law fraud claims insofar as they "relate to" ERISA plans is consistent with decisions from other jurisdictions both before and after *McClendon*. *See Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1136-37 (7th Cir. 1992)(ERISA preempted employee's claims for breach of contract and breach of duty of good faith and fair dealing arising out of termination, allegedly to deprive him of benefits); *Kelso v. General American Life Ins. Co.*, 967 F.2d 388, 391 (10th Cir. 1992) (ERISA preempts claim for misrepresentation regarding coverage under benefit plan); *Olson*, 960 F.2d at 1421 (ERISA preempted state law fraud claim where employee alleged that employer misrepresented level of benefits available upon retirement); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2nd Cir. 1992) (ERISA preempted employee's misrepresentation claim based on an oral promise to pay pension benefits); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991) (ERISA preempted state law wrongful death, breach of contract, and fraudulent denial of insurance coverage action); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991) (ERISA preempted employee's state law claims for misrepresentation regarding terms of early retirement plan); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990) (ERISA preempted state law claims for negligence, breach of contract, fraud, and equitable relief relating to termination of retirement income plan); *Kentucky Laborers Dist. Council Health & Welfare Fund v. Hope*, 861 F.2d 1003 (6th Cir. 1988) (Fund's claim to recover benefits allegedly paid in violation of the plan was preempted by ERISA because, regardless of whether the claim was phrased as a "fraud action" or "equitable action" for restitution, the action required the court to examine the terms of the plan); *Barr*,

808 F.Supp. at __, 16 E.B.C. at 1202-03 (ERISA preempted state law fraud claim alleging that employer misrepresented availability of early retirement program); *Elsesser v. Hospital of Philadelphia College of Osteopathic Medicine*, 802 F. Supp. 1286, 1290-92 (E.D. Pa. 1992) (guardians' claims on behalf of incompetent patient alleging negligence, misrepresentation, and breach of contract against health maintenance organization held preempted); *Devine v. Combustion Eng'g Co.*, 760 F. Supp. 989 (D. Conn. 1991) (fraudulent inducement and breach of contract); *Reid v. Gruntal & Co.*, 760 F. Supp. 945 (D. Me. 1991), later proceeding, 763 F. Supp. 672 (D. Me. 1991) (fraudulent and negligent misrepresentation); *Ellis v. ANR Pipeline Co.*, 754 F. Supp. 103 (E.D. Mich. 1991) (ERISA preempted Ellis' state law claims of fraud and estoppel).

In sum, the Eleventh Circuit correctly concluded that *McClendon* mandates preemption of petitioner's state law claims which "relate to" General Motors' employee benefit plan. Petitioner is, therefore, foreclosed from circumventing the plan's requirements to obtain additional benefits.

II.

THE COURT SHOULD DECLINE PETITIONER'S INVITATION TO JUDICIALLY AMEND ERISA BY CREATING A FORM OF RELIEF CONGRESS DID NOT PROVIDE IN ERISA'S COMPREHENSIVE STATUTORY ENFORCEMENT SCHEME.

Petitioner admits that he is not a participant or a member of any of the other classes of persons specifically identified in Section 502 of ERISA as those who may bring a civil action pursuant to ERISA. Indeed, he acknowledged in the Eleventh Circuit that any state law fraud amendment to his complaint would be futile under ERISA (Appellant's Brief at p. 17), and argued that the court

should fashion appropriate relief by creating a federal common law fraud claim under ERISA.[6]

Petitioner's argument would require this Court to amend ERISA in two respects: by judicially amending Section 502 to provide standing to petitioner and by creating a common law ERISA claim not specifically enumerated in Section 502. The Court should decline this invitation to engage in judicial legislation.

In support of his standing argument, petitioner cites the Sixth Circuit's decision in *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *reh'g denied* (en banc), 1993 U.S. App. LEXIS 310 (6th Cir. 1993), claiming that it could "significantly affect the outcome in [his] case." (Petition at 12 n.3). The Sixth Circuit's rationale in that case is somewhat unclear. It appears, however, that the court reasoned that had the early retirement plan been offered while the plaintiffs were employed by General Motors (it was not), they would have been eligible to participate. From this hypothetical premise the court leapt, without support or logic, to the conclusion that the plaintiffs satisfied the definition of a "participant" under ERISA. In other words, plaintiffs were accorded standing because "but for" General Motors' alleged misconduct, they could have been participants, if the plan had been offered. It is the decision in *Drennan*, not this case, that stands ERISA's statutory enforcement scheme on its head.

This Court has, in effect, previously rejected the *Drennan* court's analysis by attributing natural and conventional meanings

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6. Petitioner made this argument for the first time on appeal before the Eleventh Circuit, and for that reason it should not be considered. *See Bath Iron Works v. Director, Office of Workers' Compensation Programs*, __ U.S. __, 113 S. Ct. 692, 698 n. 12 (1993); *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1551 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 3024 (1992).

to the statutory language setting forth the categories of persons entitled to sue under ERISA. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 at 117-118 (1989); ("the term 'participant' is naturally read to mean either 'employees in or reasonably expected to be in, currently covered employment,' [], or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits," []) (emphasis supplied, citations omitted); *Nationwide Mut. Ins. Co. v. Darden*, __ U.S. __, 112 S. Ct. 1344 (1992) (refusing to adopt expansive definition of "employee" despite liberal policy and purpose of ERISA; rather, traditional general common law (not the law of any particular state) definition of "employee" applies in ERISA action).[7] The Eleventh Circuit has consistently and faithfully applied this construction of the statute. *See McKinnon v. Blue Cross & Blue Shield of Alabama*, 935 F.2d 1187, 1191 (11th Cir. 1991) (executrix of former participant's estate is not participant or beneficiary as defined in 29 U.S.C. § 1002(7), (8)); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) ("Section 1132 is essentially a standing provision: it sets forth

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7. Several other courts have expressly rejected the Sixth Circuit's "but for" analysis based on their reading of this Court's decision in *Firestone*. *See, e.g., Raymond v. Mobil Oil Corp.*, 1993 U.S. App. LEXIS 840 (10th Cir. 1993) ("To say that but for Mobil's conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely claim to be participants to be deemed as such"); *Katzoff v. Eastern Wire Products Co.*, 1992 U.S. Dist. LEXIS 18992 (D. R.I. 1992). The Fifth Circuit, on the other hand, adopted an analysis similar to *Drennan* in *Christopher*, allowing plaintiffs to be deemed participants because, but for the employer's violation of ERISA, the employees would be current employees with a reasonable expectation of receiving benefits. 960 F.2d at 1221. This Court denied certiorari in *Christopher*. *Cf. Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990) (retirees who have received all vested pension benefits due under plan lack standing); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986) (rejects "but for" analysis as conferring participant status on every employee who but for some contingency may become eligible).

those parties who may bring civil actions under ERISA and specifies the types of actions each of those parties may pursue. Those standing provisions must be construed narrowly; *civil actions under ERISA are limited to those parties and actions Congress specifically enumerated in Section 1132.*") (emphasis added).

As the Eleventh Circuit correctly noted, petitioner's argument for judicial amendment to ERISA is also fundamentally at odds with this Court's previous decision in *Pilot Life,* which rejected such an extension of the remedies available under ERISA:

> [T]he detailed provisions of Section 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claim settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in Section 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot [or decided not] to incorporate expressly." (emphasis in original).

Pilot Life, 481 U.S. at 54 (quoting *Massachusetts Mutual Life Ins.*

Co. v. Russell, 473 U.S. 134, 146 (1985)) (cited with approval in *McClendon*, 498 U.S. at __, 111 S. Ct. at 485).

Petitioner's attempt to distinguish *Pilot Life* and *McCrae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991),[8] on the narrow ground that they dealt with the availability of relief (punitive and extra-contractual damages) not expressly provided by ERISA, while his claim addresses standing to sue, is unpersuasive. First, the *Pilot Life* holding is not so narrow. In that case, this Court used the quoted language from *Russell*, which held that punitive damages were unavailable in an action under Section 409(a) of ERISA, as further support for *Pilot Life's* holding that the plaintiff's state common law contract and tort claims (including fraud) relating to the alleged improper processing of his disability benefits were preempted. Second, the issue in all these cases is whether ERISA should be judicially expanded to provide relief that Congress either forgot or chose not to provide under ERISA's comprehensive statutory enforcement scheme. Petitioner's argument that the Court would only be creating a form of relief for a class of persons for whom Congress, whether through inadvertence or choice, created no relief makes a distinction without a difference. The job of amending ERISA, whether to add beneficiaries or increase the relief available, should be left to Congress.

Like the Eleventh Circuit, the Ninth Circuit has not read *Pilot Life* as narrowly as petitioner. Thus, it rejected in *Olson* the creation of a federal common law fraud claim — petitioner's second proposed judicial amendment to ERISA — because it

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8. *See also Medina v. Anthem Life Ins. Co.*, 1993 U.S. App. LEXIS 1317 (5th Cir. 1993) (uncorrected opinion) (court will decline invitation to fashion a federal common law remedy to provide plaintiff the right to recover punitive or extra-contractual damages; *Pilot Life* teaches that ERISA's civil enforcement remedies were intended to be exclusive).

"would defeat the scheme created by Congress in ERISA." 960 F.2d at 1423.[9]

ERISA does, moreover, specifically address claims of fraud by a participant or beneficiary. *See* 29 U.S.C. § 1141. The only remedy provided for a violation of this provision of ERISA is a criminal fine or imprisonment for not more than one year, or both.

Because 29 U.S.C. § 1141 addresses the issue of fraud, under *Pilot Life*, petitioner's common law fraud claim is precluded.[10] The enforcement of this section is, moreover, exclusively the duty of

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9. Petitioner not only seeks to assert such a claim, petitioner contended in the Eleventh Circuit that he knew exactly how Congress would have fashioned it. Georgia state law, he argued, provides "a most appropriate source for the development of a federal common law in this area." (Appellant's Brief at p. 20). He has failed in his petition to identify which source he now recommends for his federal common law fraud claim.

Under petitioner's approach in the Eleventh Circuit, a plaintiff in any one of the fifty states would be able to bring an ERISA common law fraud action predicated upon the law of the forum state. Such an approach ignores that, "[t]he primary purpose behind ERISA was to achieve uniformity. . . ." *See Silverman v. Barbizon School of Modeling & Fashion, Inc.*, 720 F. Supp. 966, 972 (S.D. Fla. 1989). *See also Settles*, 927 F.2d at 510 (holding that petitioner's state law claim that defendants' termination of benefits caused her husband's wrongful death was preempted by ERISA; "ERISA must prevail . . . where a state law cause of action may in any way hinder the development of a uniform body of federal labor law governing employee benefit plans"); *Baxter v. Lynn*, 886 F.2d 182, 196 (8th Cir. 1989) (state subrogation laws applying to insurance contracts are not saved from ERISA preemption in part because "[a]pplication of differing state subrogation laws to plan providers throughout the United States would frustrate ERISA's uniform treatment of benefit plans").

10. The Eleventh Circuit, consistent with this Court's precedents, has adopted the rule that a court should not exercise its authority to fashion federal common law where ERISA addresses the issue in dispute. *National Companies*

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the U.S. Attorney General. *West v. Butler,* 621 F.2d 240, 243-244 (6th Cir. 1980) (29 U.S.C. § 1141 provides criminal penalties for interference with a participant's rights where such interference is accomplished by, *inter alia,* fraud); *Goins v. Teamsters Local 639 Employers Health & Pension Trust,* 598 F. Supp. 1151, 1155 (D. D.C. 1984) (29 U.S.C. § 1141 does not provide private cause of action; enforcement is exclusive prerogative of Attorney General); *Maxfield v. Central States, Southeast & Southwest Areas Health, Welfare & Pension Funds,* 559 F. Supp. 158, 160 (N.D. Ill. 1982) (dismisses claim for wrongful discharge brought under 29 U.S.C. § 1141).

To the extent that petitioner alleges that General Motors engaged in conduct which is prohibited by 29 U.S.C. § 1141, petitioner has no civil remedy under ERISA. If petitioner is

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Health Plan v. St. Joseph's Hosp., Inc., 929 F.2d 1558 (11th Cir. 1991); *Nachwalter v. Christie,* 805 F.2d 956 (11th Cir. 1986).

In *Nachwalter,* the court refused to apply as a matter of federal common law the state law doctrine of estoppel, reasoning that:

> [t]he claim that Congress intended for the federal courts to create a body of federal common law to govern ERISA cases does not, as petitioner suggests, give a federal court *carte blanche* authority to apply any prevailing state common law doctrine it chooses to ERISA cases. A federal court may create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue before the courts . . . . [F]ederal courts may not use state common law to re-write a federal statute.

Id. at 959-960 (citations omitted). It is precisely that sort of *carte blanche* authority that petitioner would have this Court exercise in stepping outside the framework of ERISA to create a common law fraud action under the circumstances presented.

dissatisfied because 29 U.S.C. § 1141 may not provide him with the remedy he would prefer (or even with any remedy), he should take the matter to the body that created ERISA's enforcement scheme — the United States Congress.

Petitioner is inviting the Court to amend ERISA by creating a common law exception for non-participants and non-beneficiaries; his proposed exception would also provide a different remedy from that provided by statute and may have different elements in each state. This Court should decline his invitation.

CONCLUSION

For all the foregoing reasons, General Motors urges that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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